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May 17, 1995

BY HAND DELIVERY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
Room 222
1919 M Street, N.W.
Washington, D.C. 20554

Re: **MM Docket Nos. 94-149, 91-140**
Minority and Female Ownership
of Mass Media Facilities

Dear Mr. Caton:

Transmitted herewith on behalf of Qwest Broadcasting L.L.C are an original and nine copies of its Comments in response to the Commission's Notice of Proposed Rule Making (FCC 94-323 released January 12, 1995) in the above-referenced proceeding.

Respectfully submitted,

Barbara K. Gardner

Barbara K. Gardner

BKG/cml
Enclosures

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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities	)))	MM Docket Nos. 94-149 and 91-140

To: The Commission

<u>COMMENTS OF QWEST BROADCASTING L.L.C.</u>

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May 17, 1995

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SUMMARY

As a minority broadcaster, Qwest Broadcasting L.L.C. agrees with the FCC that the chief impediment to greater minority ownership of the mass media is lack of capital, especially where the goal is to acquire costly major-market television properties so as to bring a minority perspective to significant-sized audiences, as is Qwest's objective.

Therefore, Qwest strongly agrees that the FCC should decline to apply limited partnership attribution criteria to limited liability companies where doing so would advance minority ownership of broadcast stations. Particularly where minority ownership is at issue, the FCC's attribution and ownership rules should not cause the "tail to wag the dog" by compelling a choice of organizational form that is the wrong one for business purposes.

Qwest also supports the broader attribution initiative proposed in the instant proceeding: to exempt from attribution all other interests in an entity in which minorities have more than fifty percent voting control and own at least fifteen percent of the equity. To ensure meaningful minority participation and continued robust competition, the exemption should be limited to local markets where either the party

investing in the minority broadcaster does not separately own a television station, or there are at least five independently-owned television voices. Investors seeking non-attribution should be required to certify that they do not control day-to-day station operations, and the station in question should be required to remain under minority voting control, with a minimum of fifteen percent minority-owned equity, for at least three years.

Qwest also fully supports the Commission's proposal to extend regulatory concessions to existing broadcasters who "share their talent, experience and financial resources" (including any combination of equity participation, favorable loans, or loan guarantees) with minorities seeking to enter, or increase their presence in, the broadcast industry. This "incubator" proposal addresses minorities' needs for both capital and management expertise in a creative manner that provides strong incentives for broadcasters to participate.

With respect to the incubated entity, the Commission should not adopt a net worth threshold, particularly given the high cost of purchasing television properties in major markets. It should adopt a flexible approach to evaluating whether a given incubator program increases minority ownership, but require that the incubated entity be under the voting control of minorities and have at least fifteen percent minority equity investment. The incubating broadcaster should be granted an exemption from the local multiple ownership rules only in markets where five independent voices will remain.

These attribution and "incubator" proposals should create more effective incentives to promote not only the ability of minorities to enter the broadcast industry, but their access to ownership of those major broadcast properties that have the greatest potential to reach significant minority and other underserved audiences.

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
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Policies and Rules Regarding	)	MM Docket Nos. 94-149
Minority and Female Ownership of	)	and 91-140
Mass Media Facilities	)	

To: The Commission

COMMENTS OF QWEST BROADCASTING L.L.C.

Qwest Broadcasting L.L.C. ("Qwest"), by its attorneys, hereby comments on the Commission's Notice of Proposed Rule Making in the captioned proceeding (FCC 94-323 released Jan. 12, 1995) ("Notice").

I. QWEST BROADCASTING'S INTEREST IN THIS PROCEEDING.

Qwest was formed in late 1994 to promote minority ownership of television broadcast stations in major markets, with the ultimate goal of assuring both greater minority participation in the actual ownership and management of television properties, and more extensive program service directed to significant minority audiences. Its 55 percent shareholder, QwestCom L.P. ("QwestCom"), is wholly owned by African-Americans and Hispanics with significant experience in the broadcasting and entertainment industries: Quincy Jones, Geraldo Rivera, Willie Davis, Don Cornelius, and Sonia Gonsalves Salzman. Last December, Qwest filed applications to acquire stations WNOL-TV, New Orleans (BALCT-941214KG), and WATL(TV), Atlanta (BALCT-941214KH).

Tribune Broadcasting Company, the 45 percent shareholder of Qwest, is the owner of television stations WGNO, New Orleans, and WGNX, Atlanta. Qwest and Tribune have entered into a Cost-Sharing and Services Agreement to share certain backroom operations such as accounting, traffic, and technical services, and possibly studio facilities, in both New Orleans and Atlanta.[1/] This agreement is expected to result in substantial savings that will permit Qwest to provide improved programming responsive to the needs of a broad cross-section of local viewers, especially programming targeted to the African-American and Hispanic populations and other underserved audience segments. By including Tribune Broadcasting Company as a non-controlling investor, Qwest can at the outset take advantage of the resources and expertise of a larger company, and thereby create the operating efficiencies necessary to generate the capital to successfully compete as a major-market broadcaster in today's increasingly competitive marketplace. In combining the

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1/ The Agreement is not a time brokerage or local marketing agreement: Tribune will not acquire Qwest's air time. Each licensee will make its own programming decisions, maintain its own sales staff, and retain all revenues from the sale of time on its station.

experience and capital of the African-American and Hispanic owners of Qwest with the experience and capital of Tribune, Qwest's applications represent a significant milestone: substantial capital formation behind a national, minority-controlled television group owner.

II. THE COMMISSION SHOULD ADOPT NEW INITIATIVES TO INCREASE MINORITIES' ACCESS TO CAPITAL.

Recently, the National Telecommunications and Information Administration cogently explained what Qwest's experience demonstrates:

> Historically, minority owned businesses have been underrepresented in the telecommunications industries. If America is to derive maximum economic and social benefit from growth in the telecommunications industries, ownership opportunities must be available to all Americans. Evidence indicates, however, that one principal barrier to greater participation by minorities in telecommunications ownership is a persistent lack of access to the types and amounts of capital required to form and expand viable businesses. Telecommunications ownership will not be possible for minorities in a significant way if most continue to lack access to financial resources that make successful business ownership possible.

Raymond Suarez and Robert Cull, National Telecommunications and Information Administration, <u>Capital Formation and Investment in</u>

Minority Business Enterprises in the Telecommunications Industries, at 2 (1995) (emphasis added).

Thus, Qwest agrees with the Commission that "the primary impediment to minorities seeking to enter the communications industry or to increase their mass media holdings is lack of access to capital."[2/] Particularly where the objective is to acquire established major-market television properties and thereby bring the minority perspective to bear on audiences of significant size, the capital requirements can be formidable.

Qwest would add, however, as the Commission appears to recognize in its incubator proposal, that it is not only capital assistance that may be required, but also operational expertise such as that which Tribune will share with Qwest. FCC initiatives to assist new minority entrants as well as those seeking to expand their holdings should therefore seek to provide incentives for providing minorities with hands-on assistance, advice, and training in broadcast management, as well as with capital.

Regrettably, the Commission's traditional policies to promote minority ownership can provide little or no assistance to

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2/ Notice at 8, ¶ 11.

entities such as Qwest, who seek to increase their minority owners' existing broadcast holdings so as to include television properties in significant markets.[3/] The minority tax certificate, arguably the most successful FCC policy to date, has been abolished by Congress.[4/] The Commission's minority distress sale policy, utilized on only 42 occasions in its seventeen-year history,[5/] has rarely, if ever, been employed with respect to a major-market television sale, to Qwest's knowledge.

Similarly, the minority preference policy applicable in comparative hearings does not promote minority ownership of major-market television stations, since vacant television allotments are no longer available in major markets, and only rarely become available in small markets. Finally, the minority ownership incentives that have been included in the national television multiple ownership rules for the past decade have, as

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3/ Quincy Jones is the present controlling owner of WNOL-TV, and Willie Davis owns several radio stations.

4/ Although Qwest's applications to acquire WATL and WNOL-TV were grandfathered, Congress' action precludes application of the policy to future Qwest acquisitions. When it was formed, Qwest expected to be able to utilize tax certificates in all future acquisitions.

5/ <u>Notice</u> at 4, ¶ 3.

the Commission acknowledges, "not been particularly effective...."[6/]

For these reasons, Qwest fully supports the creative new initiatives the Commission now proposes to increase minority access to capital: attribution rule changes, and an incubator program.[7/]

6/ Notice at 12, ¶ 19. Indeed, since no minority-owned broadcaster owns even twelve television stations, the opportunity to own fourteen has to date been a chimera. Furthermore, the provision permitting non-minority owners to acquire attributable interests in an additional two TV stations that are minority-controlled would function as an incentive only where minority control of the additional stations is not vested in a single majority shareholder, a situation that will rarely occur.

7/ In Qwest's view, Congress's repeal of the tax certificate provision of the Internal Revenue Code is not a directive that the Commission should cease to encourage minority ownership of mass media facilities. Rather, it reflects the current Congress's determination that the provision inappropriately allowed the Commission to set federal tax policy, and did not result in an efficient use of tax dollars in any case. As both the Senate Finance Committee and the House Ways and Means Committee stated in explaining the legislation, "No other provision of the Internal Revenue Code conveys the level of discretion to a Federal government agency [(or any other party for that matter) in any way] comparable to the discretion conveyed on the FCC by section 1071. Thus, section 1071 grants the authority to the FCC to administer what is, in effect, an open-ended entitlement program with no constraints imposed to limit the extent to which the FCC may utilize the provision." S. Rep. No. 16, 104th Cong., 1st Sess. 17 (1995); H.R. Rep. No. 32, 104th Cong., 1st Sess. 16-17 (1995) (bracketed language omitted from Senate Report). In other words, Congress's repeal of Section 1071 should not be construed to mean that Congress no longer believes that one of the Commission's core goals should be the maximization of diversity of viewpoints available to the public over the mass media. Notice at 2, ¶ 1.

III. THE COMMISSION SHOULD ADOPT ITS PROPOSED ATTRIBUTION INITIATIVES TO BENEFIT MINORITY-CONTROLLED COMPANIES.

Qwest strongly agrees that the FCC should, as it has proposed, adopt the following two attribution initiatives to stimulate the flow of capital to minority-controlled companies:

- Decline to apply limited partnership attribution criteria to limited liability companies where doing so would advance minority ownership of broadcast stations;[8/] and
- Grant non-attributable status to all interests with less than fifty percent voting control of any entity in which minorities own more than fifty percent of the voting control, so long as the minorities also own at least fifteen percent of the entity's equity.[9/]

A. At A Minimum, The Commission Should Not Treat Limited Liability Companies As Limited Partnerships Where Partnership Treatment Will Preclude Enhanced Minority Ownership.

As explained above, the relationship which QwestCom and Tribune have negotiated in creating Qwest involves not only

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8/ This initiative is proposed in the FCC's concurrently pending attribution proceeding, as an exception to the Commission's proposal generally to treat limited liability companies as limited partnerships for attribution purposes. Review of the Commission's Regulations Governing Attribution of Broadcast Interests, Notice of Proposed Rule Making in MM Docket No. 94-150, FCC 94-324 at 35, ¶ 69 (released Jan. 12, 1995) ("Attribution Notice").

9/ Notice at 16-17, ¶ 26.

equity investment by both entities, but also certain joint operations to provide cost efficiencies to both Qwest and Tribune -- just as the Commission advocates in the context of its incubator proposal, discussed below. Under the parties' Cost-Sharing and Services Agreement, for example, Qwest may contract with Tribune for research, creative, advertising, publicity, and other promotion services for the Qwest stations. Consequently, should limited partnership attribution criteria be applied to Qwest, Tribune could not be deemed an "insulated" limited partner, and Tribune's interest would therefore be attributable,[10] creating a violation of the Commission's current television duopoly rule given Tribune's existing ownership of WGNO(TV), New Orleans, and WGNX(TV), Atlanta.

Qwest selected the limited liability company ("L.L.C.") form of organization for the tax benefits it offers, but structured its particular L.L.C. to function like a corporation in certain respects in order that Tribune's interest would be non-cognizable under current Commission rules, given QwestCom's

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[10] An insulated limited partner must have no material involvement in the management or operation of the media-related activities of the partnership. 47 C.F.R. § 73.3555 Note 2(g)(1).

status as a single majority shareholder.[11/] If forced to restructure as a corporation to comply with the Commission's attribution rules, Qwest will be required to forego significant tax advantages. Thus, Qwest fully concurs with the Commission's Attribution Notice proposal that where services will be provided to an L.L.C. that would otherwise preclude "insulation" of the provider of those services, and such services are an integral part of a proposal that will significantly enhance minority ownership of broadcast facilities, L.L.C.s should not be treated as limited partnerships.[12/] Particularly where the advancement of minority ownership is at issue, at a minimum the Commission's attribution and ownership rules should not cause the "tail to wag the dog" by compelling a choice of organizational form that is the wrong one for business purposes.[13/]

11/ Id. at Note 2(b) (No minority voting stock interest is cognizable if there is a single holder of more than 50% of the outstanding voting stock of the corporate broadcast licensee in which the minority interest is held).

12/ Attribution Notice at 35, ¶ 69; see also id. at 33, ¶ 64.

13/ Ironically, though Qwest was structured to advance minority ownership, improve service to minority audiences, and thereby benefit the public interest, the Commission's structural rules potentially create a greater impediment to Qwest than to, e.g., broadcasters who enter into time brokerage agreements with no public service objectives in mind.

B. **Where Minorities Exercise Voting Control Of A Licensee And Own Fifteen Percent Of Its Equity, No Other Interests Should Generally Be Attributable.**

Qwest supports the broader attribution initiative proposed by the Commission in the instant proceeding, namely to exempt from attribution all other interests in an entity in which minorities have more than fifty percent voting control and own at least fifteen percent of the equity.[14/] Such a rule would provide a strong incentive for other well-established broadcasters, such as Tribune, to enter into ventures like the Qwest venture with other minority broadcasters, or new minority entrants, who lack the capital and experience to acquire and successfully manage broadcast stations.

Qwest recommends, however, three limitations on such a rule in order to ensure meaningful minority participation and continued robust competition. First, in lieu of a blanket attribution exemption, Qwest suggests that the rule's application be limited to local markets where either the party investing in the minority broadcaster does not own a television station, or there are at least five independently-owned commercial and

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[14/] Notice at 16, ¶ 26. Although the Commission refers to "50 percent of the voting stock," it apparently (and appropriately) intends its proposed rule to apply not only to corporations, but to any form of business organization. Id.

noncommercial television voices. In this way, the potential for a single entity to dominate the local market for syndicated program purchases or the local television advertising market would be limited.[15/]

Second, to assure that the minority owners benefiting from the relaxed attribution rule actually control the licensee, Qwest agrees with the Commission's proposal to require non-minority investors seeking non-attribution to certify that they do not exercise control over the day-to-day operations of the broadcast station.

Finally, Qwest suggests the adoption of a three-year holding period requirement: the station in question must remain under minority voting control, with fifteen percent minority-owned equity, for a minimum period of three years.[16/] Even if the station is sold or the non-minority investors exercise options to acquire control following the passage of three years,

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15/ Although Qwest recommends limiting the proposed attribution exemption on a local basis, the Commission should not further limit it by adopting the "affiliate" rules enacted in the PCS context. See 47 C.F.R. § 24.720(l).

16/ See Reexamination of the Policy Statement on Comparative Broadcast Hearings, Notice of Proposed Rule Making in GC Docket No. 92-52, 7 FCC Rcd 2664, 2668, 2672 n.12 (1992) (recommending "service continuity" comparative preference for new station applicants volunteering to hold station three years, but expressing willingness to consider mandatory three-year holding period for all new comparative hearing selectees).

the public interest benefits attributable to three years of minority control will have exceeded any "costs" of having provided three-year attribution relief to the non-minority investors.

IV. THE COMMISSION SHOULD ALSO ADOPT ITS PROPOSED "INCUBATOR" PROGRAM.

Qwest also fully supports the Commission's proposal to extend regulatory concessions to existing broadcasters who, in the FCC's words, "share their talent, experience and financial resources" with minorities seeking to enter, or increase their presence in, the broadcast industry.[17/] As Qwest has pointed out, it is not only capital, but also management expertise, that can hinder the successful participation of minorities in broadcasting. In Qwest's view, the incubator proposal addresses both these needs in a creative manner that provides strong incentives for broadcasters to "incubate" minority broadcasters.

Qwest agrees that an acceptable incubator program should include: (1) substantial financial assistance, including any combination of equity participation, favorable loans, or loan guarantees; (2) operational assistance; and (3) training

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[17/] Notice at 10, ¶ 16.

programs.[18/] While we would leave most of the details of the requirements and rewards applicable to the incubating operator to the Commission and those commenters who may qualify as such operators, Qwest offers the following views with respect to the incubated entity.

First, the Commission should not adopt a net worth threshold "to ensure that the benefits of an incubator program are available only to those minority . . . operators who have the greatest need for capital."[19/] In Qwest's view, minorities will not play a significant role in the broadcast industry until they own major-market television stations, since broadcast television remains the most pervasive influence on Americans and their values, and most Americans live within the top fifty television markets.[20/] Minorities are just beginning to break into the elite world of major-market TV station ownership, in part because of the high cost of purchasing stations in such markets.[21/] Thus, while Quincy Jones, Geraldo Rivera, Willie

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18/ Id. at 13, ¶ 20.

19/ Id. at 12, ¶ 17.

20/ Broadcasting & Cable Yearbook 1995 at C-219 (Neilsen Designated Market Areas (DMAs) ranked 1 through 50 contain 67.3% of U.S. TV households).

21/ See, e.g., the following 1994 purchase applications: BALCT-940928KF ($200 million purchase price for WTXF(TV), Channel
(continued...)

Davis, Don Cornelius, and Sonia Gonsalves Salzman will contribute some $9 million to Qwest, it is the additional capital, cost-sharing opportunities, and financial markets expertise contributed by Tribune that have helped make the Qwest venture a reality. Such minorities as those controlling Qwest should not be precluded from being the future beneficiaries of an FCC incubator program simply because they may be deemed to have high individual net worths.22/

For similar reasons, the Commission should also reject a rigid approach to assessing whether a particular incubator program increases minority ownership.23/ For example (as is the case with the presently pending Qwest applications), if an "incubated" transaction involves a package of two or more

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21/ (...continued)
29, Philadelphia, Pennsylvania); BALCT-940329KE ($110 million purchase price for WWL-TV, Channel 4, New Orleans, Louisiana); BTCCT-941213KU ($100 million purchase price for WSBK-TV, Channel 38, Boston, Massachusetts).

22/ We also note that in an analogous context, that of PCS, the Commission recently rejected a net worth test for minority and other beneficiaries of its "designated entity" preference program, finding that "[t]he obstacles faced by minorities and minority-controlled businesses in raising capital ... are not necessarily confined to minorities with limited personal net worth." Implementation of Section 309(j) of the Communications Act - Competitive Bidding, 10 FCC Rcd 403, 421 (1994) (footnote omitted).

23/ Notice at 12, ¶ 18. ("We do not intend to deem acceptable an incubator program that does not increase minority or female ownership").

acquisitions, only one of which will result in first-time minority control of a major market television station, the venture should be viewed as a whole, instead of being deemed partially unqualified for "incubator" treatment.

On the other hand, the Commission should require that the incubated entity be under the voting control of minorities, and have at least fifteen percent minority equity investment. Without such requirements, an incubator program could be readily susceptible to abuse.[24/]

Finally, we again suggest that incubating broadcasters be allowed to exceed the local multiple ownership rules only in markets where five independent commercial and noncommercial television voices will remain. Moreover, the additional local station allowed to the incubating operator need not be a new acquisition: the incubator program should permit existing station owners to incubate same-market minority-controlled stations in which they may hold attributable interests without violating the Commission's multiple ownership rules.[25/]

24/ Although the Commission includes such minority ownership requirements in its attribution relief proposal, its incubator program does not appear to contain any proposed minimum level of minority ownership or control of the incubated entity.

25/ Such a provision would be redundant, of course, in the event that the Commission adopts its proposal, described above, to (continued...)

Qwest also observes that in its pending Attribution Notice, the Commission has sought comment on whether debt, accompanied by other close business relationships, should be considered attributable.[26] If such a suggestion is adopted, it should contain an exemption for incubating operators, who will be required to provide substantial financial assistance (which may include loans), as well as other operational assistance, in order to qualify for the incubator program.

Finally, it is Qwest's view that whether or not the incubator proposal is adopted, the Commission should adopt its proposed relaxation of the attribution rules in cases where minorities hold voting control and fifteen percent of the equity of a broadcast company (as discussed in Section III above), because the attribution proposal imposes fewer requirements on the non-minority investor and therefore is likely to attract more "takers." But in the event that both the attribution and incubator proposals are adopted, as Qwest recommends, the two should be independently enforced, so that an investment by a non-minority that does not qualify for the incubator program will

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25/ (...continued)
exempt other investors from attribution where minorities vote a controlling interest in a licensee and own 15 percent of its equity.

26/ Attribution Notice at 47, ¶ 98.

nevertheless be deemed non-attributable if the investment vehicle qualifies for attribution relief because it is one in which minorities have voting control and hold at least a fifteen percent equity interest.

CONCLUSION

In order to create more effective incentives to promote not only the ability of minorities to enter the broadcast industry, but their access to ownership of those major broadcast properties that have the greatest potential to reach significant audiences in markets where disproportionate numbers of minority group members live, the Commission should adopt the attribution and "incubator" provisions it has proposed, with the modifications suggested by Qwest.

Respectfully submitted,

QWEST BROADCASTING L.L.C.

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